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Supreme Court, U.S.
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No. 01-1501

In The Supreme Court of The United States

OCTOBER TERM, 2001

GRAY DAVIS, et al., *Petitioners*,

v.

JOHN ARMSTRONG, et al., *Respondents*.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DONALD SPECTER
Counsel of Record
SARA NORMAN
PRISON LAW OFFICE
General Delivery
San Quentin, CA 94964
Telephone: (415) 457-9144
Facsimile: (415) 457-9151

MICHAEL BIEN
ROSEN BIEN & ASARO
155 Montgomery St., 8th Fl.
San Francsico, CA 94104
Telephone: (415) 433-6830
Facsimile: (415) 433-7104

Counsel for Respondents

1899

QUESTION PRESENTED

Whether a state statute that imposes a mandatory duty to grant parole under certain specified conditions creates a liberty interest entitling disabled prisoners who cannot effectively read, write, hear, or think to the assistance they need to understand and meaningfully participate in parole proceedings?

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STATEMENT OF THE CASE

California's parole statute requires that life prisoners eligible for parole must be released by the Board of Prison Terms (BPT), California's parole board, unless the prisoner's release would create an unreasonable danger to public safety. Cal. Penal Code § 3041(b). California also requires that prisoners being considered for parole be provided with certain procedural safeguards, including the right to an attorney, to be present at their hearings, to ask questions, and to submit documentary evidence. Cal. Penal Code §§ 3041.5, 3041.7. State courts in California have long found that due process rights attach to parole consideration hearings. *See In re Sturm*, 521 P.2d 97, 102 (Cal. 1974); *In re Clutchette,* 114 Cal. Rptr. 509, 511-12 (Cal. Ct. App. 1974).

Plaintiffs are California prisoners and parolees who are deaf, blind, mobility impaired, developmentally disabled (*e.g.*, mentally retarded) and learning disabled. App. 7a. They sued officials in charge of the California Department of Corrections (CDC) and the BPT because these public entities deprived them and other members of the plaintiff class of access to services and programs available to non-disabled people in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, Section 504 of the Rehabilitation Act of 1973 (§504), 29 U.S.C. § 794, and the Due Process Clause of the U.S. Constitution. App. 7a. Plaintiffs contended, among other things, that they were effectively deprived of their due process rights because they were not provided with the assistance they needed (such as sign language interpreters, trained assistants, readers, Braille and large print materials) that would allow them to meaningfully participate in their parole hearings. App. 8a.

The case against the BPT was tried to the court for ten days in the spring of 1999.[1] App. 61a. The district court found that defendants had engaged in a systematic failure to conduct parole procedures in a lawful manner. App. 62a-64a. The court found that the unlawful conduct was widespread, frequent, and "not subtle." App. 63a. For example,

> [s]ome prisoners who use wheelchairs have had to crawl up stairs to get to their hearings; mentally retarded prisoners who cannot even spell their names have waived their rights to a hearing and spent years in prison without the benefit of any assistance; a blind witness was denied access to information at his hearings because he could not see the documents; and hearing impaired prisoners who normally express themselves by using sign language had their hands shackled at their hearings, making such communication impossible.

App. 63a-64a. The court held that the defendants displayed a "shocking. . . level of indifference" to the plaintiffs' basic rights and had "no confidence that the BPT Defendants can cure or even recognize the statutory and constitutional deficiencies" that were found. App. 64a.

The court specifically concluded that defendants violated plaintiffs' due process rights because plaintiffs "received deficient notice, unknowingly waived important rights and [have] been subject to fundamentally unfair procedures from the moment of initial notice until the conclusion of appeal." App. 144a. For example, mentally

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[1]The CDC portion of the case settled and is not relevant to the present petition. App. 10a.

retarded class members were given no assistance comprehending their parole hearings; without such assistance it was impossible for them to participate meaningfully. App. 98a. A deaf and mentally retarded prisoner could not understand or participate in his parole hearing because he was not given the assistance he needed to communicate. App. 22a at n.20. A blind prisoner was required to make his case for parole without being given written materials in Braille, large print, or audio tapes, and without a reader. App. 112a; *see also* App. 95a-96a.

Considering the evidence in its entirety, the court concluded that defendants had denied plaintiff class members "their fundamental right to be heard in a meaningful manner." App. 145a (citation omitted). Because defendants remained in "utter denial of the scope of the violations of Plaintiff class members' statutory and constitutional rights" even after being presented with overwhelming evidence of their misconduct at trial, the district court concluded that injunctive relief was warranted. App. 149a.

Thus, faced with defendants' massive failure to honor their statutory and constitutional obligations, the court issued a Permanent Injunction and directed that Judgment be entered in favor of plaintiffs. App. 145a-150a. Among its legal conclusions, the district court ruled that California's parole statute was sufficiently determinate to confer a liberty interest on plaintiffs. App. 143a. Thus, defendants' failure to provide plaintiffs with the assistance they needed to be able to understand and participate in their hearings violated their federal due process rights. App. 144a-145a.

On appeal, defendants did not contest the district court's factual findings of widespread and systematic statutory and constitutional violations. App. 6a. They did

contest certain holdings of the district court, including the court's holding that the plaintiff class had the right to due process at parole suitability hearings. App. 25a. The Ninth Circuit affirmed the district court's holding that the parole statute was sufficiently determinate to confer a liberty interest. *Id.* Thus, defendants' failure to "enable [plaintiff class members] to attend or comprehend parole and parole revocation hearings" violated their due process rights. *Id.*

ARGUMENT

I. INTRODUCTION

Defendants argue that *Sandin v. Conner,* 515 U.S. 472 (1995), has caused a split among the Courts of Appeal over the standard to apply in determining whether state parole statutes give rise to liberty interests for life prisoners seeking parole. They cite five Circuit cases to demonstrate this split. Defendants are incorrect: there is no Circuit split and no confusion in the lower courts.

Sandin addressed the question of when a change in conditions of confinement gives rise to a constitutionally protected liberty interest. It explicitly did not overrule *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979), which addressed the very question posed here: whether a state parole statute created a liberty interest. *Sandin,* 515 U.S. at 483 n.5. Since the two cases address such different subjects - the duration of confinement versus conditions of confinement - the reasoning of *Sandin* cannot be applied in parole cases. Accordingly, all the Courts of Appeal to examine liberty interests in state parole schemes since *Sandin* have continued to follow this Court's reasoning in *Greenholtz,* and the Ninth Circuit's decision in the present case unremarkably falls in line with these other cases.

The only other Circuit cases cited by defendants are inapposite. They address due process rights of prisoners being transferred from work furlough or halfway house type programs back to prison, a change of conditions of confinement that falls squarely within the holding of *Sandin.* None of these cases purports to apply *Greenholtz* or even mentions the case, since they address situations

fundamentally different from parole consideration.

Thus, there is no split of authority among the Circuits. The lower courts properly continue to follow *Greenholtz* in parole consideration cases and to follow *Sandin* in cases involving conditions of confinement. The Court should therefore deny the petition for certiorari.

II. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CIRCUIT SPLIT OVER THE PROPER ANALYSIS TO DETERMINE WHETHER A LIBERTY INTEREST EXISTS IN A STATE'S PAROLE CONSIDERATION PROCEDURES

Defendants are wrong in asserting that *Greenholtz* and *Sandin* present opposing standards for the review of state parole statutes. *Greenholtz* directly addressed liberty interests in the parole consideration process, finding that a Nebraska state parole statute, by its mandatory language, created a liberty interest based on the expectancy of release it engendered. *Greenholtz*, 442 U.S. at 11-12. *Sandin,* however, addressed the issue of when an adverse change in conditions of confinement creates a liberty interest. *Sandin,* 515 U.S. at 487. *Greenholtz* analyzed a parole statute that governed the duration of confinement, while *Sandin* looked to prison conditions to determine whether an adverse change was of sufficient magnitude to trigger due process protections.

Sandin instructs lower courts to look to the nature of the confinement that the state sought to impose through the challenged procedure. *Sandin,* 515 U.S. at 483-84. If the confinement poses an "atypical and significant hardship in relation to the ordinary incidents of prison life," a liberty

interest is created and the prisoner is entitled to due process. *Id.* Thus, *Sandin* looked at the nature of the confinement in disciplinary segregation, not the language of the disciplinary regulations, to determine whether the prisoner had a liberty interest in the disciplinary proceedings.

Parole cases, however, always directly involve the prisoner's sentence and potential liberty. That is why, unlike *Sandin, Greenholtz* looked to the language of the parole statute, which is part of the prisoner's sentence. It is that statute which determines whether prisoners have a state created right to be released under specified circumstances. Sandin itself acknowledged that its holding was premised on conditions rather than duration of confinement, characterizing the state rule under review as "a prison regulation primarily designed to guide correctional officials in the administration of a prison," and distinguishing its holding from those cases in which "the State's action will inevitably affect the duration of his sentence." *Sandin*, 515 U.S. at 481-82, 487.

Thus *Sandin* established guidelines for procedural due process claims brought within the unique characteristics of the prison environment. In moving away from examining the language of the regulations in order to determine whether they invoke a liberty interest, the Court cited two policy considerations that are prison specific. First, prison officials must be able to promulgate regulations using mandatory language to guide discretion of prison staff to ensure uniformity, without fear of conferring liberty interests and the attendant right to a hearing. *Sandin*, 515 U.S. at 482. That concern is not present in California since by statute the prisoner has a right to a hearing with substantial procedural protections. Cal. Penal Code § 3041.5. Second,

Sandin considered the need for prison officials to manage the day-to-day affairs of their "volatile environment[s]" without undue interference from federal courts. *Sandin*, 515 U.S. at 482. Parole, by nature, does not involve the micro-management of prison facilities. Moreover, *Sandin* set a threshold that avoided such interference for prison matters that were not sufficiently serious to warrant review. However, a prisoner's interest in being paroled according to the terms of his sentence always has sufficient weight to merit the protection of the due process clause. It certainly is of equal or greater magnitude than virtually any prison condition that imposes an "atypical and significant hardship."

Since *Sandin* is inapplicable to parole, lower courts have properly continued to rely on *Greenholtz*. This reasoning is articulated most thoroughly in *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C. Cir. 1996). In *Ellis,* the D.C. Circuit examined the language of the District of Columbia parole statute to determine whether it conferred a liberty interest on the prisoner seeking parole, as instructed by *Greenholtz. Ellis*, 84 F. 3d at 43-46. It found that the parole statute and regulations in question accorded such "substantial discretion" to the parole board that they lacked the mandatory nature that would support a liberty interest. *Id.* at 45-46.

In the present case, the Ninth Circuit explicitly followed *Ellis. Armstrong v. Davis,* 275 F.3d 849, 864 (9th Cir. 2001). The court examined the parole statute as required by *Greenholtz* and held that it was "sufficiently determinate to require [parole] hearings as a matter of constitutional right." *Id.*; App. 25a. Defendants do not claim in their petition that the Ninth Circuit's holding was

incorrect under *Greenholtz*.[2]

The Seventh Circuit, in *Heidelberg v. Illinois Prisoner Review Board*, 163 F.3d 1025, 1026 (7th Cir. 1998), *cert. denied*, 528 U.S. 955 (1999), also examined the language of the Illinois parole statute as required by *Greenholtz* to determine whether it was sufficiently mandatory in nature to confer a liberty interest in parole. The court did not find a liberty interest, holding that it was bound by the Illinois Supreme Court's determination that the statute conferred complete discretion on the parole board to grant or deny parole. *Id.* at 1026-27.

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[2]Furthermore, any analysis by this Court of the liberty interests in California's parole process is particularly inappropriate at this time: the California Supreme Court has recently accepted review of a case in which a lower court found that the California parole statute creates a federal liberty interest. *In re Rosenkrantz*, 116 Cal. Rptr. 2d 69, 80-81 (Cal. Ct. App. 2002), *review granted*, 46 P.3d 331 (Cal. 2002). Since state court interpretations of state statutes are relevant to federal court reviews of the federal due process interests involved, any analysis at this time, without the benefit of the California Supreme Court's interpretation, is liable to be incomplete. *Greenholtz*, 442 U.S. at 12; *Heidelberg v. Illinois Prisoner Review Board*, 163 F.3d 1025, 1027 (7th Cir. 1998), *cert. denied*, 528 U.S. 955 (1999) ("[w]e... are bound to follow a state's highest court's interpretation of its own state law" regarding the level of discretion granted to the parole board by the parole statute); *Ellis*, 84 F.3d at 1420 (in considering whether a state parole statute confers liberty interests, the court "must respect [the state court's] construction of [state] law").

Thus, all the cases involving parole decisions have appropriately continued to follow *Greenholtz*.

Defendants argue that three Circuits have followed *Sandin* in the parole context. Defendants are wrong. In *Hamm v. Latessa*, 72 F.3d 947 (1st Cir. 1995), *cert. denied*, 519 U.S. 856 (1996), the First Circuit addressed a prisoner's claim that the Massachusetts parole board's interpretation of a state parole statute regarding the timing of his parole hearing denied him due process. Because the case involved only the state law question of when the plaintiff's hearing should be held, it has no relevance to the present case. The First Circuit properly deferred to a state court holding that the parole board's interpretation of the state statute was correct. *Id.* at 955. Federal due process rights were not implicated because the case involved only a straightforward interpretation of state law.

In *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995), *cert. denied*, 516 U.S. 1059 (1996), the Fifth Circuit considered whether Texas's parole statutes conferred a liberty interest. The court held that the statutes had already been determined by other Fifth Circuit panels not to confer a liberty interest. *Orellana*, 65 F.3d at 32 (citations omitted). Those prior decisions relied on *Greenholtz* in their analysis of the state parole statutes. *See Creel v. Keene*, 928 F.2d 707, 712 (5th Cir.), *cert. denied,* 501 U.S. 1210 (1991); *Gilbertson v. Texas Bd. of Pardons & Paroles,* 993 F.2d 74, 75 (5th Cir. 1993). The *Orellana* court considered itself bound by those determinations and did no independent analysis of the statute. Consistent with *Ellis, Armstrong,* and *Heidelberg,* however, the court did note that *Sandin* was not determinative in the parole context. *Orellana,* 65 F.3d at 32 ("Orellana's claims might have implicated the narrow

range of prisoner liberty interests remaining after *Sandin* because he challenges procedures relative to parole, which affects the duration of confinement").

The only other cases defendants cite are not parole cases at all: they involve the question of when prisoners have liberty interests in halfway house or work furlough type programs. *See Dominique v. Weld,* 73 F.3d 1156 (1st Cir. 1996); *Asquith v. Department of Corrections,* 186 F.3d 407 (3d Cir. 1999); *Callender v. Sioux City Residential Treatment Facility,* 88 F.3d 666 (8th Cir. 1996). Prisoners in such programs remain technically incarcerated but are granted limited access to the outside world. Because these cases involved conditions and not the duration of confinement, the Circuit courts employed a *Sandin* analysis to determine when a liberty interest was created. Not one of the courts even mentioned *Greenholtz.* Such conditions of confinement cases are irrelevant to a discussion of parole consideration cases, to which the reasoning of *Sandin* does not apply.

CONCLUSION

All Courts of Appeal that have examined state parole statutes to determine whether they confer liberty interests following *Sandin* have, like the Ninth Circuit in *Armstrong,* continued to rely on *Greenholtz.* The opinion below is consistent with the applicable holdings of this Court and with the opinions of the other Circuits that have addressed this issue. The petition for writ of certiorari should be denied.

Dated: July 24, 2002.

Respectfully submitted,

DONALD SPECTER
Counsel of Record
SARA NORMAN
PRISON LAW OFFICE
General Delivery
San Quentin, CA 94964
Telephone: (415) 457-9144
Facsimile: (415) 457-9151

Counsel for Respondents

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CERTIFICATE OF SERVICE BY MAIL

Donald Specter, a member of the Bar of the Supreme Court of the United States, states:

that his business address is General Delivery, San Quentin, CA; that on July 24, 2002, he served three copies of the OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI in the above-entitled matter on the petitioners by placing same in an envelope addressed as follows:

Frances T. Grunder
Supervising Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664

Said envelope was then sealed and deposited in the United States Mail at San Rafael, California, with the postage thereon fully prepaid.

Donald Specter
Counsel of Record for Respondents